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No. 649

In the Supreme Court of the United States

October Term, 1942.

MARGARET MASHUNKASHEY, NOW BRADSHAW,
Petitioner,

vs.

UNITED STATES OF AMERICA, A. G. WILLIAMS, GDN. JAMES G. BLAINE, JR.; MAMIE MASHUNKASHEY, EXECUTRIX OF THE ESTATE OF BEN MASHUNKASHEY, DECEASED; AND L. M. COLVILLE AND JOHN W. KEITH, JOINT ADMINISTRATORS ESTATE OF PAH-PU-SON-TSA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

Reply to Brief of Respondents in Opposition to Petition for Writ of Certiorari.

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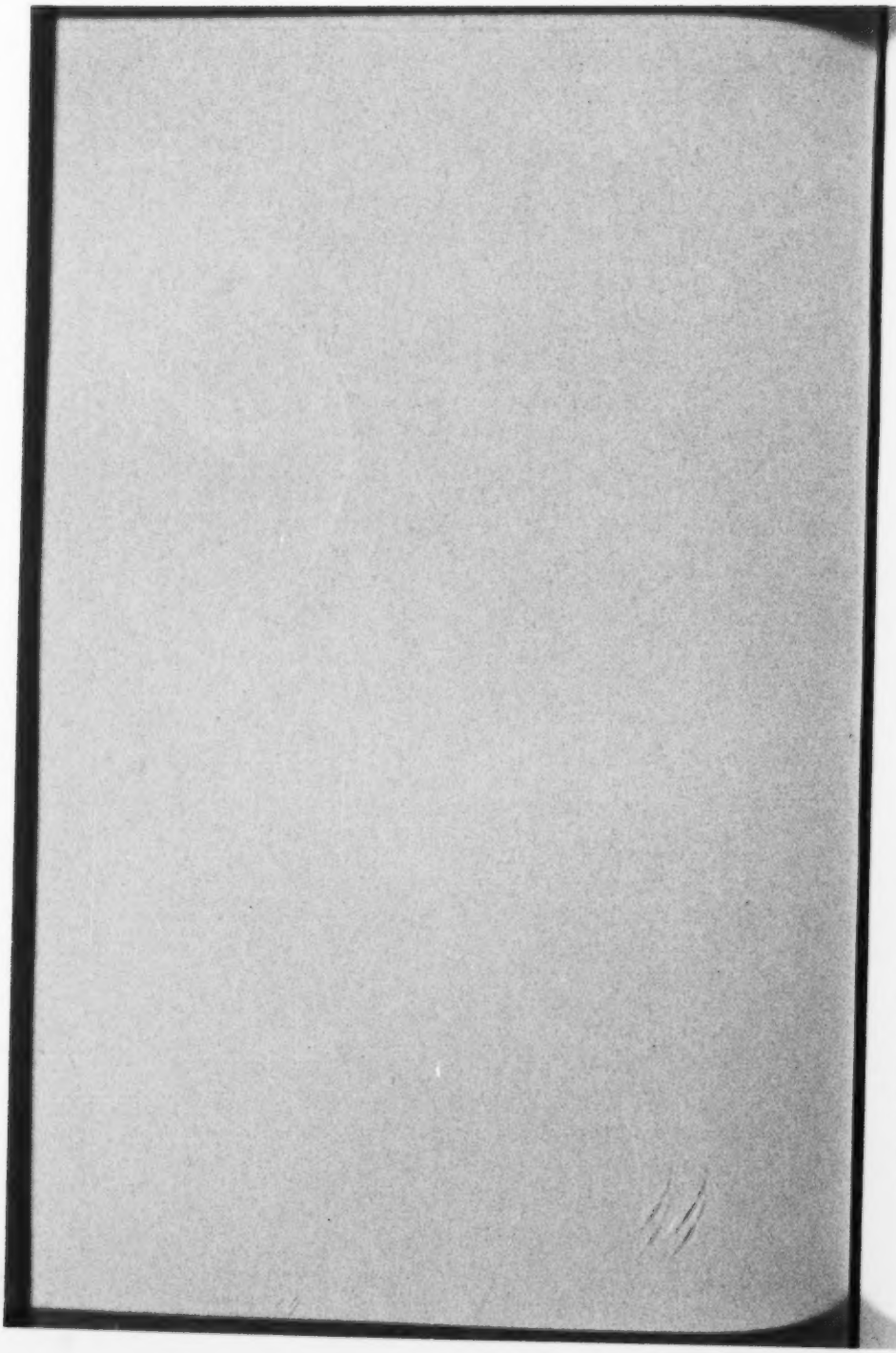

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REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

The respondent, the United States, and intervener respondents have filed separate briefs in opposition to this court granting the writ. The purpose of this reply will be to direct the court's attention to certain propositions stated in said brief which it is believed are not supported by authorities.

1. Intervener respondents on page 3 refer to Section 5 of Rule 38 of this court to the effect that the writ will only be granted where there is a special or important reason, asserting, however, on page 3 as follows: "There is but one question which relates itself to the propriety of the granting *certiorari.* * * * That question is, whether the United States District Court for the Northern District of Oklahoma has jurisdiction to render a declaratory judgment under the facts and circumstances related in the above statement."

The question of jurisdiction is and always has been a question of importance and so considered by this court. In *City of Gainesville* v. *Brown-Crummer Inv. Co.,* 277 U. S. 54, 48 S. Ct. 454, 456, this court stated:

> "* * * Of course a question of jurisdiction cannot be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time. *Grace* v. *American Central Ins. Co.,* 109 U. S. 278, 283, 3 S. Ct. 207, 27 L. ed. 932; *Mansfield C. & L. M. Railway Co.* v. *Swan,* 111 U. S. 379, 382, 4 S. Ct. 510, 28 L. ed. 462; *Mattingly* v. *Northwestern Virginia Railroad Co.,* 158 U. S. 53, 56, 57, 15 S. Ct. 725, 39 L. ed. 894."

(See also *City of Indianapolis* v. *Chase National Bank of City of New York,* 314 U. S. 63, 62 S. Ct. 15.)

The position of petitioner may be summarized as follows: *That the United States has no authority to maintain an action upon behalf of Indian wards and confer jurisdiction on the federal court of controversies relating to unrestricted property, unless to enforce some duty or obligation created by treaty or statute.*

In addition to authorities cited in our original brief, pages 13 to 18, as to the right of the United States to main-

tain an action on behalf of Indians to decree a defendant has no interest in property without establishing the interest claimed is restricted or acquired in violation of government restrictions. The court's attention is directed to *United States* v. *Waller,* 243 U. S. 452, 37 S. Ct. 430, 431, 433, wherein the United States brought action in the federal court on behalf of Indian wards to cancel deeds executed by the wards. The bill alleged the property had been acquired from the Indians by fraud and based solely upon the theory of its guardianship over said Indians, sought to vacate and cancel the deeds. The district federal court dismissed the bill on the theory the United States had no capacity to maintain the action and confer jurisdiction upon the federal court as the land was unrestricted. The Circuit Court of Appeals for the Eighth Circuit certified to this court the following question:

> Has the United States capacity to maintain the suit in question on behalf of the Indians named?

The court, in answering said question, determined the lands were not restricted, and further stated:

> "In view of the legislation and the particular act in question, we are unable to find any authority in the United States to maintain this suit on behalf of the Indians named."

The court distinguished the case of *Heckman* v. *United States,* 244 U. S. 413, 56 L. ed. 820, 32 S. Ct. 424, wherein it was held the United States could maintain an action to cancel conveyances "made by members of the Cherokee Nation in violation of restrictions imposed by Acts of Congress," and stated:

> "That case differs from the present one in which there has been no disposition of the lands in violation

of restrictions imposed by Congress upon alienation by the Indians."

The court further stated:

> "It does not follow that the Indians are without remedy in proper actions brought by themselves or their guardians, if there be such, for the protection of their rights."

The opinion quotes from *Dickson* v. *Luck Land Co.*, 242 U. S. 371, 61 L. ed. 371, 37 S. Ct. 167, as follows:

> "With those restrictions entirely removed and a fee simple patent issued, it would seem that the situation is one in which all questions pertaining to the disposal of the land naturally would fall within the scope and operation of the law of the state."

And concludes:

> "We reach the conclusion that in this suit, the United States was without capacity to bring the action for the benefit of the Indians named."

In *Mullen, et al.,* v. *United States,* 224 U. S. 448, 32 S. Ct. 495, 496, 498, the government brought suit to cancel certain conveyances made by full-blood heirs of allottee. That as to the authority of the United States to maintain the action for Indian wards, the court stated:

> "The government is entitled to invoke the equity jurisdiction of its courts for the purpose of enforcing these restrictions.
>
> * * * * * * * *
>
> "The question remains whether, in the execution of the conveyances to the appellants, the restrictions imposed by Congress have been violated."

The court reviewed the various Acts of Congress as to restrictions and held that the restrictions, upon death of

the allottee, ceased, and the land as it passed to the heirs was no longer restricted and the Indians were entitled to execute the conveyances.

The court then stated:

> "* * * These Indian heirs were vested with an interest in the property which, in the absence of any provision to the contrary, was the subject of sale. The fact that they were 'full-blood' Indians makes no difference in this case, for, at the time of the conveyance in question, heirs of the full-blood, taking under the provisions of paragraph 22 of the supplemental agreement had the same right of alienation as other heirs."

The above cases are conclusive that the government has no capacity by virtue of its general guardianship to maintain an action upon behalf of Indian wards, unless the subject-matter of the action involves restricted property, or, unless the duty of the government is based and founded upon some treaty or federal statute.

The government in its brief asserts to the contrary. However, the decisions cited and relied upon do not support a contrary view.

As pointed out in *United States* v. *Waller, supra,* the capacity of the government to maintain the action in *Heckman* v. *United States, supra,* was based upon the fact the land was disposed of in violation of restrictions imposed by Congress. In *United States* v. *Minnesota,* 270 U. S. 171, 46 S. Ct. 298, the court held that where the United States is only a nominal party it cannot maintain an action and confer jurisdiction upon the court. However there was involved in said case the duty and obligation owed by the United States to the Indians under treaty to account to the Indians for the proceeds from the land on which patents

had wrongfully issued in violation of that duty and obligation. In *Cramer* v. *United States,* 261 U. S. 219, 43 S. Ct. 342, wherein the government had, contrary to statute, issued a grant to land which already had been, under statutory construction, reserved and otherwise disposed of to the Indians. The court held the government was under the direct duty and obligation to protect the Indians in their possession.

McCurdy v. *United States,* 246 U. S. 263, 38 S. Ct. 289, holds contrary to the government's contention in the present case. The government brought suit to cancel taxes levied upon lots owned by an Indian in the City of Pawhuska. The lots at one time were a part of Osage Nation. Said tribal title was extinguished under the Osage Township Act of March 3, 1905 (33 Stat. 1061). Thereafter one of said lots passed in possession of an Osage Indian and, in acquiring the property, the deed of the Indian contained a restriction against alienation without consent of the Secretary, but was not tax exempt. The court held that restriction against alienation was not violated by levying a tax upon the same. The District Court held it had jurisdiction and the United States had the right to maintain the action, but this court reversed the judgment of the lower court with directions to dismiss the bill.

In *Morrow, County Auditor,* v. *United States,* (8 C. C. A.) 243 Fed. 856, the question involved was whether, under the patents issued by the government, the land was taxable. The court held the land was free from taxation and having issued the patent to the Indians, it was the duty of the government to protect the Indians against taxes levied in violation of terms of patent which the government issued.

The above cases do not support the government's the-

ory that the United States has capacity to maintain an action and confer jurisdiction upon the federal court of a controversy between Indians and third parties, unless the controversy relates to restricted land.

The case of *Strickland* v. *Peters,* (5 C. C. A.) 120 F. (2d) 53, has no application, as jurisdiction was conferred by reason of diversity of citizenship.

The case of *Caesar* v. *Burgess,* (10 C. C. A.) 103 F. (2d) 503, 506, has no application, as jurisdiction in said case was conferred by special Act of Congress, being Section 3 of the Act of April 12, 1926, (44 Stat. 239-240) which authorized the United States on behalf of restricted members to remove a case to the federal court. The court in that case recognized it would have no jurisdiction under general law.

It is submitted, under the authority of *United States* v. *Waller, supra,* and *Mullen* v. *United States, supra,* and authorities cited at pages 13 to 17 of our original brief, the District Court was without jurisdiction of the controversy herein involved, as the controversy involved private rights not based or founded upon any federal statute, but governed by local law.

The government and interveners seek to change their position in this court and uphold jurisdiction of the federal court and the judgment on the merits on a theory different from that set forth in the pleadings (R. 9-17), and on which the case was tried in the lower court; that is, that the petitioner herein is disqualified by reason of not being of Indian blood from inheriting any portion of said estate. In the lower court, the respondents took the position that the question of Indian blood was not involved and objected to the evidence on behalf of petitioner that she was of Indian

blood (R. 98). The petitioner, over objections of respondents, testified that her father was dead; that he had told her he was of Cherokee blood, deriving said blood either from his grandmother or great-grandmother.

They now assert that under Section 7 of the Act of Congress of February 27, 1925, (43 Stat. 1008) to-wit:

> "Hereafter none but heirs of Indian blood shall inherit from those who are one-half or more Indian blood of the Osage tribe of Indians any right, title, or interest to any restricted lands, moneys or mineral interests of the Osage tribe; *provided*, that this section shall not apply to spouses under existing marriages,"

she is disqualified as an heir. If said statute has any application, it constitutes an exception to the general statutes regulating descent, and the burden was upon the respondents to plead the application of the statute, and further prove by evidence that petitioner was not of Indian blood. This they did not do. (*Schlemmer* v. *Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 27 S. Ct. 407; *Grand Trunk Ry. Co.* v. *United States*, (7 C. C. A.) 229 Fed. 116; *Interstate Commerce Co.* v. *Baird*, 194 U. S. 25, 36, 37, 24 S. Ct. 563; *Ryan* v. *Carter*, 93 U. S. 78, 83; *Ansell* v. *City of Boston*, (Mass.) 153 N. E. 167; *Moreland* v. *Director General of Railroads*, (N. J.) 114 Atl. 424; *United States* v. *King & Howe*, (2 C. C. A.) 78 F. (2d) 693; *Moorehouse* v. *Noble*, (Ind.) 141 N. E. 254.)

Clearly, the judgment cannot be upheld upon a theory unsupported by pleadings or evidence.

Respondents cite *White House Lbr. Co.* v. *Howard*, 142 Okl. 163, 165, 286 Pac. 327, in support of the contention that no title vested in petitioner, the surviving wife of decedent. On page 17 of our brief, we cited *Davis* v. *Morgan*, 186 Okl.

30, 95 P. (2d) 856, which held that on death of intestate, vesting of title to intestate's property in the heirs was immediate. Said decision construed Section 1615, Oklahoma Statutes 1931, which reads as follows:

> "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the County Court, and to the possession of any administrator appointed by that court for the purpose of administration."

The County Court in the administration of the estate may, under said section, dispose of said property under certain conditions and thus divest the heir of said property by operation of law. In *White House Lbr. Co.* v. *Howard, supra,* the County Court in the administration of the estate, sold the property to pay debts. The lumber company had a judgment against one of the heirs which constituted a lien upon the heir's interest in the real estate, and contended this lien was not disturbed by the sale of the property by the County Court. The court held to the contrary as the title of the heir was subject to the power of the County Court in the administration proceedings to sell the property, and this wiped out the heir's title, and also the lien asserted against said heir's interest. The same is true if the land is sold in partition. (See *United States* v. *Bond,* (10 C. C. A.) 108 F. (2d) 504.)

The above case has no application to any issue involved herein.

Respondents assert their right under a written instrument not executed by petitioner, but by an attorney without sufficient statutory authority. The applicable statutes as to power to convey interest in real property are copied

in appendix of our original brief, page 31. The government relied upon a letter (R. 50) which is insufficient under said statute. No fraud or estoppel is pleaded or established.

Interveners on page 5, in support of the right of the government and interveners to maintain this action in the federal court, state: "* * * particularly in view of the fact that the state courts were refusing to assume jurisdiction to pass upon the question of the validity of the release." The record does not support that statement. The County Court held it had no jurisdiction in administration proceedings to determine controversy herein, as in said proceeding, said court had no equity jurisdiction to determine controversies arising subsequent to ancestor's death. Such is the holding in *Parr* v. *Reyman,* (Cal.) 12 P. (2d) 441, wherein it is held:

> "'Matters of probate' within the probate court's jurisdiction do not include claims against heirs of devisee for his portion of the estate, arising subsequent to ancestor's death, whether claim arises by virtue of contract or *in invitum.*"

In *Rust* v. *Gillespie,* 90 Okl. 59, 216 Pac. 48, as to equity powers in matters of probate, the court held:

> "Not having general equity powers, courts of probate have no jurisdiction over the subject of trusts, or regulation and control of trust estates, these questions belong exclusively to courts of equity." (Citing *Straun* v. *Brady,* 84 Okl. 66, 202 Pac. 505, and *Homer* v. *Lester,* 95 Okl. 284, 219 Pac. 392, *certiorari* denied, 44 S. Ct. 330, 264 Pac. 580.)

The above is the extent of the holding of the County Court, and it was so alleged in the petition. (R. 14)

Respondents on page 8 of their brief assume, contrary

to settled law, that in an action to quiet title, the burden is on defendant to establish title. The correct rule is stated in our original brief, page 21, that the burden is upon plaintiff to allege and establish superior title. (*United States* v. *West Virginia*, 295 U. S. 463, 471, 475, 55 S. Ct. 789, 792, 793; *Dick* v. *Foraker*, 155 U. S. 404, 15 S. Ct. 124; *Frost* v. *Spitley*, 121 U. S. 533, 7 S. Ct. 1129; *Smith* v. *Reneau*, 188 Okl. 629, 112 P. (2d) 160.)

The opinion of the Supreme Court of Oklahoma in construing Section 7 of the Act of February 27, 1925, *supra*, is not final and will be presented to this court in a few days.

The question of the capacity of the United States to maintain the action and confer jurisdiction upon the federal court to construe the force and effect of an instrument executed by attorney for petitioner involves no federal question and the jurisdiction of the court is duly challenged in the application for the writ. This might not be important if this court or other Circuit Courts had held the federal courts had jurisdiction of such controversies. But when the decisions of this court support a contrary view, the question becomes important.

It is submitted when the Circuit Court of Appeals, as it has by this decision, extends the jurisdiction of the court to a controversy between citizens of the same state which involves no federal statute or question, or disposition of restricted property in violation of federal restrictions, contrary to the spirit and letter of the former decisions of this court, the writ should issue.

Respectfully submitted,

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